

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GERALD RUSSELL,

Plaintiff,

vs.

DANIEL N. GORDON, P.C., an Oregon debt
collection law firm, and SECURITY
CREDIT SERVICES, LLC., a Mississippi
Limited Liability Company,

Defendants.

NO. CV-12-0514-JLQ

**MEMORANDUM OPINION and
ORDER RE: REMOVAL;
DENYING REQUEST FOR
REMAND**

This case was originally filed on May 1, 2012 in Spokane County Superior Court alleging the Defendants' violations of the Fair Debt Collection Practices Act, Washington's Consumer Protection Act, and the state law tort of Outrage. Defendant Daniel N. Gordon, P.C. ("Gordon, P.C.") removed the case to this court on August 21, 2012.

On August 23, 2012, this court questioned whether the Notice of Removal was deficient as it was unclear whether the removal was timely. The record suggested that both Gordon, P.C. and Security Credit Services had been served the summons and complaint in February 2012 and had thereafter participated in state court dispositive motion proceedings. The court ordered the Defendant to show cause on or before September 4, 2012 why the matter should not be remanded to state court. The court also

1 set the same deadline for Plaintiff to file any challenge to the removal.

2 Both the Defendant and Plaintiff have timely responded to the court's August 23,
3 2012 Order. Gordon, P.C. responded to the court's Show Cause Order contending the
4 removal was timely filed within the thirty-day statutory period as it was filed six days
5 after Gordon, P.C. waived formal service of process. Plaintiff also filed a "Response" to
6 the court's Order asking the court to remand the case to state court, even though a motion
7 to remand is the proper procedure for challenging removal. Plaintiff contends Gordon,
8 P.C. had waived its right to removal based on the state court conduct of the law firm's
9 owner, sole shareholder, president, and registered agent for service -- Daniel N. Gordon --
10 counsel for Co-Defendant, Security Credit Services, LLC. Specifically, Plaintiff
11 contends that Mr. Gordon was aware of the state court action and right to remove the
12 case, but waited months to execute an acceptance of service form on behalf of his firm.
13 Plaintiff contends that Mr. Gordon waived personal service on behalf of the firm and
14 consented to the jurisdiction of the state court by arguing the law firm's defenses in the
15 state court dispositive motion proceedings. The central issue is when the thirty-day
16 removal period prescribed by statute commenced running.

17 **I. LITIGATION BACKGROUND**

18 The following is the relevant litigation history as presented in the Notice of
19 Removal and the parties' responses to the court's Show Cause Order.

20 On February 12, 2012, Plaintiff's counsel emailed an attorney working at the law
21 firm of Daniel Gordon, P.C. notifying him of Plaintiff's intent to initiate a lawsuit against
22 Daniel N. Gordon, P.C. ("Gordon, P.C.") and its client, Security Credit Services
23 ("Security Credit"). The email asked the firm to notify Plaintiff's counsel if the firm
24 would waive service of process. The very next day, the law firm notified its insurance
25 carrier (the Oregon Professional Liability Fund ("PLF")) of the potential lawsuit.

26 On February 16, 2012, Plaintiff served a copy of the state court summons and
27 Complaint on Security Credit. Although the summons was addressed to both Security
28 Credit and Gordon, P.C., Plaintiff did not formally serve Gordon, P.C.

1 On March 26, 2012, Attorney Kevin Curtis of Winston & Cashatt mailed Plaintiff's
2 counsel a Notice of Appearance on behalf of Gordon, P.C.

3 On March 29, 2012, attorney Daniel N. Gordon, president of and registered agent
4 for Daniel N. Gordon, P.C., emailed Plaintiff's counsel stating: "As to service of DNG,
5 PC, send me the summons and complaint with an acceptance of service and I will sign it
6 and send it to the PLF. This case will be removed to the District court after service is
7 accepted." (ECF No. 6, Ex. 3).

8 On April 13, 2012, Plaintiff's counsel received an email from Mr. Gordon stating
9 that the claims were "baseless," and demanding the Complaint be filed so he could file
10 dispositive motions. ECF No. 4, Ex. E.

11 On May 1, 2012, Plaintiff filed the Complaint in Spokane County Superior Court.
12 On or about, May 2, 2012, Mr. Gordon filed a Notice of Appearance on behalf of
13 Security Credit, together with a document captioned "Motions for Partial Summary
14 Judgment and Motions to Dismiss." The motions sought the dismissal of all the claims in
15 the Complaint. The argument made by Security Credit therein was that it could not be
16 held liable because the law firm of Daniel N. Gordon, P.C. could not be held liable. Mr.
17 Gordon filed an Affidavit in support of the motions, in his role as the "sole shareholder
18 and owner of Daniel N. Gordon, P.C.," outlining the relevant conduct of the law firm as it
19 pertained to Plaintiff's claims.

20 On May 9, 2012, the firm of Winston & Cashatt and its attorney Kevin Curtis filed
21 its Notice of Appearance (dated and mailed on Plaintiff's counsel on March 26, 2012) on
22 behalf of Daniel N. Gordon, P.C. in the state court action. (ECF No. 1 at 69-70).

23 On June 20, 2012, Plaintiff filed a cross motion for summary judgment against
24 Security Credit seeking summary judgment on liability under the Fair Debt Collection
25 Practices Act. Security Credit and Plaintiff's motions were heard in Spokane County
26 Superior Court on August 10, 2012. Mr. Gordon appeared and argued his motions on
27 behalf of Security Credit. Attorney Curtis representing Gordon, P.C., did not appear at
28 the hearing. (ECF No. 7). Though there is no evidence of this in the record, Plaintiff

1 states in his response to the court's Order to Show Cause that "Mr. Gordon lost the
2 dispositive motions in state court" and that "a judgment [was] issued against his client."
3 (ECF No. 4 at 6, 8).

4 On August 16, 2012, Mr. Gordon prepared and signed an Acceptance of Service
5 form on behalf of Gordon, P.C. and mailed it to Plaintiff's counsel.

6 On August 21, 2012, counsel for Gordon removed this case from state court to this
7 court.

8 **II. DISCUSSION**

9 **A. Legal Standards Governing Timely Removal**

10 The right of removal to federal court may be lost in several ways: by failure to
11 apply for removal within the timeframe provided therefore by law, or it may be waived
12 by agreement or conduct.

13 *1. Commencement of the Thirty-Day Time Period*

14 For a notice of removal to be timely, it "shall be filed within thirty days after the
15 receipt by the defendant, through service or otherwise, of a copy of the initial pleading
16 setting forth the claim for relief upon which such action or proceeding is based ...". 28
17 U.S.C. § 1446(b). "[A] named defendant's time to remove is triggered by simultaneous
18 service of the summons and complaint, or receipt of the complaint, 'through service or
19 otherwise,' after and apart from service of the summons, but not by mere receipt of the
20 complaint unattended by any formal service." *Murphy Bros. v. Michetti Pipe Stringing*,
21 526 U.S. 344, 347–48 (1999). In reaching this conclusion, the Supreme Court read
22 Congress' provisions for removal in light of the following principle: "An individual or
23 entity named as a defendant is not obliged to engage in litigation unless notified of the
24 action, and brought under a court's authority, by formal process." *Id.* at 347. "In the
25 absence of service of process ... a court ordinarily may not exercise power over a party
26 the complaint names as a defendant." *Id.* at 350. "[O]ne becomes a party officially, and is
27 required to take action in that capacity, only upon service of a summons or other
28 authority-asserting measure stating the time within which the party served must appear

1 and defend.” *Id.* “Unless a named defendant agrees to waive service, the summons
2 continues to function as the sine qua non directing an individual or entity to participate in
3 a civil action or forgo procedural or substantive rights.” *Id.* at 351. While this court
4 agrees with then Chief Justice Rehnquist's dissent, joined by Justices Scalia and Thomas,
5 that the majority Opinion in *Murphy Bros.* reads out of the removal statute the language
6 "or otherwise," this court is bound by *Murphy Bros.* The facts in the matter *sub judice*
7 establish without any question at all that the defendant Gordon law firm not only received
8 a copy of the complaint some 120 days before the removal filing, but that Gordon
9 participated fully in the state court proceedings as counsel for the co-defendant Security
10 Credit Services. Counsel for Gordon served a Notice of Appearance on behalf of
11 Gordon, the removing Defendant, some 150 days prior to removing the action from state
12 to federal court.

13 Washington law requires personal service of the Summons and Complaint. See
14 Wash. Rev.Code 4.28.080(15); Washington Superior Court Civil Rule (CR) 4(c); and CR
15 4(d)(2). Whether a defendant has waived personal service is a question of state law.

16 2. Waiver

17 “A party, generally the defendant, may waive the right to remove to federal court
18 where, after it is apparent that the case is removable, the defendant takes actions in state
19 court that manifest his or her intent to have the matter adjudicated there, and to abandon
20 his or her right to a federal forum.” *Resolution Trust Co. v. Bayside Developers*, 43 F.3d
21 1230, 1240 (9th Cir.1994). “A waiver of the right to removal must be clear and
22 unequivocal.” *Id.* (citations and internal quotations omitted). “In general, the right of
23 removal is not lost by action in the state court short of proceeding to an adjudication on
24 the merits.” *Id.* (citations and internal quotations omitted).

25 B. Analysis

26 1. Waiver of Service

27 It is undisputed that there was no formal service of process on Gordon, P.C. to start
28 the removal clock. The question Plaintiff presents is whether the removal clock was

1 nevertheless started where the defendant has, by its conduct, waived service. Although it
2 is undisputed Gordon, P.C. *formally* waived service on August 16, 2012, it is Plaintiff's
3 contention that the law firm's waiver actually occurred when, after being aware of the
4 summons and complaint, Mr. Gordon "filed dispositive motions, ostensibly on behalf of
5 his client, but obviously designed to assert defenses on behalf of Daniel Gordon, P.C," on
6 May 2, 2012. (ECF No. 8 at 7). While that position is appealing as a practical matter,
7 Plaintiff offers no case law where such an argument was accepted. .

8 Under Washington law, waiver requires “ ‘the intentional abandonment or
9 relinquishment of a known right [and i]t must be shown by unequivocal acts or conduct
10 showing an intent to waive, and the conduct must also be inconsistent with any intention
11 other than to waive.’ “ *Clark v. Falling*, 92 Wash.App. 805, 812-13 (1998) (quoting
12 *Mid-Town Ltd. P'ship v. Preston*, 69 Wash.App. 227, 233, 848 P.2d 1268 (1993)).
13 Cases have held that the mere appearance by a defendant in an action does not qualify as
14 a waiver to the defense of sufficiency of service. *Adkinson v. Digby, Inc.*, 99 Wash.2d
15 206, 209, 660 P.2d 756 (1983). Likewise, service is not waived where the lack of service
16 defense is pleaded in an answer, prior to objecting to a trial date, taking a deposition, and
17 consenting to amendment of the complaint. *French v. Gabriel*, 116 Wash.2d 584, 594
18 (1991). However, conduct sufficiently dilatory or inconsistent with the assertion of the
19 defense of insufficient service of process may waive the defense. For example, waiver
20 was declared in Washington state court where a party had failed to plead insufficient
21 service, engaged in several months of discovery, discussed mediation, and failed to
22 respond to interrogatories inquiring about a possible insufficient service defense.
23 *Lybbert v. Grant County*, 141 Wash.2d 29, 38-39 (2000).

24 Although waiver of the defense of insufficient service may occur when a party files
25 declarations and seeks affirmative relief in state court, this court cannot conclude that Mr.
26 Gordon's behavior, on behalf of his client Security Credit , "*unequivocally*" evidenced an
27 intent to waive service on behalf of Gordon, P.C. The out of court conduct of the parties
28 indicates that in March 2012, Mr. Gordon indicated he was willing to sign a waiver of

1 formal service on behalf of the firm, *if Plaintiff's counsel would provide him a copy of the*
2 *summons, complaint and a waiver form.* Plaintiff's counsel did not comply with this
3 request with Mr. Gordon or Gordon, P.C.'s counsel. This failure occurred despite being
4 informed by Mr. Gordon that upon acceptance of service he intended to have the case
5 removed to federal court. The court cannot conclude that Gordon, P.C. effectively
6 waived service of process by its conduct any sooner than August 16, 2012, the date Mr.
7 Gordon, himself, prepared and signed a waiver of service form on behalf of the Gordon
8 law firm.

9 2. Waiver of *Right to Remove*

10 A closely related but separate question raised by the facts but not explicitly argued
11 is whether Gordon, P.C. *waived the right to remove* by taking "actions in state court that
12 manifest[ed] his or her intent to have the matter adjudicated there, and to abandon his or
13 her right to a federal forum." *Resolution Trust Co. v. Bayside Developers*, 43 F.3d 1230,
14 1240 (9th Cir.1994). As set forth above, like the law of waiver of defenses in state court,
15 the waiver of the federal right to remove must be "clear and unequivocal." *Id.* The court
16 cannot conclude, based on the record before it, that Gordon, P.C. proceeded to an
17 adjudication on the merits or conducted itself in a manner manifesting an intent to have
18 the claims against it adjudicated in state court. Though it is a relatively close call, the
19 court finds that the filing of Mr. Gordon's declaration in support of his Security Credit's
20 summary judgment motion falls just short of what is required to waive the right to
21 remove based upon alleged inconsistent conduct.

22 **III. CONCLUSION**

23 The issues raised herein are the result of lack of actual service of process, as well
24 as Gordon's decision to simultaneously represent his client while his firm was a named
25 co-defendant in the same litigation. While the court believes the "or otherwise" receipt of
26 a copy of the complaint should have triggered the 30 removal period, the Supreme Court
27 has ruled to the contrary. Such a ruling is the final state of the current law, not
28 necessarily the correct one.

1 The court concludes the deficiencies in the Defendant's Notice of Removal
2 identified by the court in the Order to Show Cause have been corrected. The Defendant's
3 removal was timely and the court must reject Plaintiff's request for remand. A separate
4 Notice setting this matter for a Scheduling Conference will be forthcoming.

5 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Memorandum
6 Opinion and Order and furnish copies to counsel.

7 **DATED** this 9th day of October, 2012.

8 s/ Justin L. Quackenbush
9 JUSTIN L. QUACKENBUSH
10 SENIOR UNITED STATES DISTRICT JUDGE
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